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Extinguishing Claims From Passive Smokers

BY JOSEPH F. MANGANI

The hazards of tobacco smoke are in the news again, but with a new twist that should make underwriters sit up and take notice. In response to cigarette manufacturers' remarkable success in defending product liability claims by smokers, antismoking activists have taken a new approach: suits by nonsmokers allegedly injured by other people's cigarette smoke. When these suits come to trial, the insurance industry will discover whether juries are more sympathetic to nonsmokers than they have been to smokers, who are consistently found to have voluntarily assumed the risks inherent in tobacco use.

On January 7, the U.S. Environmental Protection Agency released a report classifying environmental tobacco smoke as a Group A, or known, human carcinogen. The EPA report also estimated that secondhand tobacco smoke annually causes the deaths of 3,000 adult nonsmokers due to lung cancer, as many as 300,000 lower-respiratory-tract infections among children under 18 months old, and increases the frequency and severity of symptoms in up to 1 million asthmatic children. The report identifies secondhand smoke as a causal factor in middle-ear infections, upper-respiratory-tract infections and reduced lung function in infants, and as a risk factor for new cases of childhood asthma.

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EVEN MORE LITIGATION

The report's findings probably will generate calls for new state laws restricting smoking in public places and may prompt the Occupational Safety and Health Administration to develop a standard on smoking in the workplace. The report also provides additional ammunition to nonsmoking plaintiffs who claim to suffer from lung cancer induced by secondhand smoke. Plaintiffs' attorneys already have indicated that litigation will expand beyond tobacco manufacturers to employers and businesses that permit smoking on their premises. If such lawsuits materialize, the defense costs borne by general liability and workers' compensation insurers will increase, although substantive damage awards are unlikely.

While the EPA report presents no new data, its primary conclusions are drawn from 30 epidemiologic studies in eight countries of lung cancer among nonsmoking women whose husbands were tobacco users. Although each study reported a higher incidence of lung cancer among exposed women, only six independently found statistically significant differences. None of the 11 U.S. studies reported a statistically significant increase in risk from secondhand smoke. The 17 studies that ranked subjects by estimated exposure level, which is critical to determining a dose-response relationship, all found the incidence of lung cancer rose with increased exposure, and nine of the studies reported a statistically significant difference at the highest exposure level. Only one study attempted to measure actual exposure to secondhand smoke, and none investigated its possible effects on male subjects.

In analyzing the data from previous studies, EPA staff and the

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Science Advisory Board had to contend with several circumstances that can impede the ability of scientific research to identify a statistically significant relationship between secondhand smoke and lung cancer. Detection of carcinogenic responses usually demands high exposure levels generally found only in occupational settings or experimental animals. Spousal smoking does not produce the high level of exposure researchers would prefer, and animal studies have measured only the effects of direct inhalation of mainstream smoke.

Also, because virtually everyone is exposed to a measurable level of secondhand smoke, it is impossible to isolate a truly unexposed group for comparison with exposed subjects. Therefore, researchers must compare groups with different exposure levels. The background exposure, which generally is higher than spousal exposure, also obscures the effects of passive smoking in the experimental group.

To overcome the problems associated with low incremental exposure and significant background exposure, EPA adjusted the results from all the studies downward to allow for misclassification of active and former smokers as never having smoked. Individual results were assessed for the strength of their association with the overall results and, when exposure level data was available, exposure-response trends. Although two-thirds of the research originally reported no statistically significant association, the probability that their independent results would be so consistent is infinitesimal.

The pooled results produced a larger database with a much higher statistical credibility than any single underlying study. Applying a 90% confidence factor, EPA found a statistically significant increase in the incidence of lung cancer among all exposed subjects and across diverse geographical areas.

As expected, tobacco manufacturers quickly attacked EPA, its report and the classification of secondhand smoke as a Group A carcinogen. The Tobacco Institute accused EPA of adjusting science to fit a specific policy goal, discarding generally accepted statistical guidelines, ignoring significant new research and the recommendations of its own expert panel, basing its classification of secondhand smoke on its chemical similarity to mainstream smoke and acting on the report's conclusions before they had been compiled. While many people believe the institute has strained its credibility, some of its criticism stands on a firm foundation and may influence judicial evaluation of expert testimony based on EPA's findings.

The strongest criticism lies in EPA's acceptance of statistical significance at a 90% confidence level. This departs from all past EPA hazard assessments and generally accepted research standards, which demand at least 95% confidence to support conclusions as strong as those drawn by EPA. Adoption of such a significant procedural change on a highly controversial issue may raise serious questions about the validity of their conclusions. However, the Tobacco Institute's insistence on evaluating only the results of individual studies also appears to be misplaced because it would discard a scientifically valid tool for assessing data from diverse sources.

The EPA report indicates that spousal smoking is the only single source of secondhand smoke that makes a material contribution to the incidence of lung cancer.

MORE CRITICISM

The Tobacco Institute further criticizes EPA for omitting a 1992 study funded by the National Cancer Institute that found no statistically significant association between secondhand smoke and adverse health effects. If these findings are added to the database, the statistical significance of the link between passive smoking and lung cancer disappears, the institute claims. But the National Cancer Institute research was published in November, when EPA was finishing its report, and requiring its incorporation into the database is unreasonable. However, any new scientific evaluation supporting the institute's contention would serve to discredit EPA's conclusions and impair their evidentiary value.

While EPA awarded a contract for preparation of a "Workplace Policy Guide" on smoking before finalizing its formal risk assessment, that does not necessarily indicate bias or predetermined policy objectives. Because research begins with gathering, collating and analyzing data, its conclusions often are known before the formal report is drafted, which can take months or even years for government agencies.

At this time, there is little reason for underwriters to expect the classifica-

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tion of secondhand smoke as a Group A carcinogen to have any significant effect on damage awards. Plaintiffs still must bear the burden of proving a causal relationship between exposure to secondhand smoke and their own injuries, a process that is much more difficult than simply attributing the deaths of 3,000 nonsmokers each year to passive smoking. The scientific evidence supporting the risk assessment is the least persuasive EPA has ever accepted and there already are indications that new research may discredit its findings. Also, epidemiologic research is of little value in determining the likely cause of any individual case of lung cancer. In addition, tobacco companies remain the most promising defendants, and they have long since abandoned the search for affordable product liability insurance.

NONEXPERT TESTIMONY

The judiciary also may question the validity of the evidence used to measure the adverse health effects of secondhand smoke. Burned by hundreds of lawsuits and several multimillion-dollar verdicts founded on "scientific" evidence that later was discredited, judges have begun to take a more critical look at expert testimony. A growing number of courts have refused to admit expert testimony that is not based on generally accepted scientific theory and methodology. In departing from its own established standards and those of the scientific community, EPA's classification of secondhand smoke as a Group A carcinogen will be scrutinized carefully.

Businesses that permit smoking on their premises may face claims by customers or employees, but the prevalence of secondhand smoke, the relatively low level of exposure and the questionable scientific evidence linking it to adverse health effects should provide adequate defense. Plaintiffs who are successful in attributing their cancer to passive smoking will face the formidable task of persuading a jury that a single source of exposure is at least the principal cause of their illness. Also, despite pervasive exposure to secondhand smoke in social and occupational settings, the EPA report indicates that spousal smoking is the only single source that makes a material contribution to the incidence of lung cancer. Research on male subjects and occupational exposure to secondhand smoke consistently has failed to find a statistically significant link to lung cancer or any other pathological condition. □

LOSS NOTES

Continental Introduces Farm Fire-Safety Guide

Continental Insurance, New York, distributed the fourth in a series of Farm Safety-Awareness Guides to its farm insurance agents. The guide addresses fire hazards and prevention, loss-control procedures and emergency responses. Previous guides covered farm vehicle safety, all-terrain vehicle safety and pesticide handling. Subsequent farm safety-awareness guides are planned.

CCC Provides Cash Values On Equipment, Vehicles

CCC Information Services, Chicago, introduced a program that provides underwriters with a regionalized cash value and description of insured heavy equipment and commercial vehicles. The regionalized cash value helps underwriters and clients match insurance protection to equipment value and serves as a reference in claims handling. The service also accommodates improvements or repairs to the insured property during the policy period.

IMUA Schedules Seminars On Disasters in Midwest

The Inland Marine Underwriters Association is holding seminars on the potential effect of floods, tornados, hurricanes, hail and earthquakes in the Midwestern states. The seminars will be held May 18 in Chicago and May 19 in Minneapolis and Columbus, Ohio. To register, contact Barbara Spain at (312) 559-9330, Lynda Olson at (612) 893-5968 or Ann Boehmcke at (312) 648-5165.

Lindsey Morden Opens Office in Wichita, Kan.

Lindsey Morden Claims Services, Tyler, Tex., opened an office in Wichita, Kan. The office, located in Suite 1, 8017 East Douglas, is managed by Don Reed, who previously was a multiline adjuster in Lindsey Morden's Amarillo, Tex., and Lawton, Okla., branches. The Wichita office telephone number is (316) 684-4114.

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